Supreme Court, U.S.
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No. 90-1037

In The

Supreme Court of the United States

October Term, 1990

JOHN MOORE,

Petitioner,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, DAVID W. GOLDE, M.D., SHIRLEY G. QUAN,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a taking claim under the federal Constitution is property reviewable by this Court when the claim was not properly raised in, and was not passed upon by, the state court whose judgment is sought to be reviewed.

2. Whether a state court judgment is properly reviewable by this Court under 28 U.S.C. § 1257(a) when the judgment remands the case for further proceedings which may result in factual determinations which eliminate the federal question on which review is sought.

3. Whether a patient whose excised body tissue is used in state-sponsored medical research has a valid claim against the state under the United States Constitution for the taking of his property without just compensation, on the ground that he did not expressly authorize the research.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 5

1. The Federal Question on Which Petitioner Seeks Review Was Not Properly Raised, and Was Not Passed Upon, in the State Courts ... 5

2. The Judgment of Which Petitioner Seeks Review is Not a Final Judgment Within the Meaning of 28 U.S.C. § 1257(a) Because It Contemplates Further State Court Proceedings Which May Render Moot Petitioner's Purported Constitutional Claim 11

3. Petitioner Has No Valid Taking Claim Under the United States Constitution 13

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 18

Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965) 12

Beck v. Washington, 369 U.S. 541 (1962) 6, 7

Bishop v. Wood, 426 U.S. 341 (1976) 13

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 14

Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. January 18, 1991) 16

Carroll v. State Bar, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305, *cert. denied* 474 U.S. 848 (1985) 19

Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944) 14

Diamond v. Chakrabarty, 447 U.S. 303 (1980) 21

Dunscombe v. Loftin, 154 F.2d 963 (5th Cir. 1946) 13

Estate of MacDonald, 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990) 6

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 6, 7

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 8, 11

First Victoria Nat. Bank v. United States, 620 F.2d 1096 (5th Cir. 1980) 15

Fuller v. Oregon, 417 U.S. 40 (1974) 6

Henning v. Industrial Welfare Com., 46 Cal. 3d 1262, 762 P.2d 442, 252 Cal. Rptr. 278 (1988) 6

TABLE OF AUTHORITIES – Continued

Page

Kewanee Oil Company v. Bicron Corporation, 416 U.S. 470 (1974) 21

Mazer v. Stein, 347 U.S. 201 (1954) 21

Molko v. Holy Spirit Assn., 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert. denied* 109 S. Ct. 2110 (1989) 6

Peduto v. City of North Wildwood, 878 F.2d 725 (3d Cir. 1989) 9

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 14, 16, 19, 20

People v. Calio, 42 Cal. 3d 639, 724 P.2d 1162, 230 Cal. Rptr. 137 (1986)..... 6

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 10

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)..... 12

Street v. New York, 394 U.S. 576 (1969) 5, 6

Texaco, Inc. v. Short, 454 U.S. 516 (1982).....12, 13

United States v. 564.54 Acres of Land, 441 U.S. 506 (1979) 19

United States v. Locke, 471 U.S. 84 (1985) 12

United States v. Miller, 317 U.S. 369 (1943)..... 19

United States v. Powelson, 319 U.S. 266 (1943)..... 19

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 10, 13, 14, 19

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).....7, 8, 9, 10

TABLE OF AUTHORITIES – Continued

Page

Yuba River Power Co. v. Nevada Irr. Dist., 207 Cal. 521, 279 P. 128 (1929) 15

Zacchini v. Scripps – Howard Broadcasting Co., 433 U.S. 562 (1977) 21

STATUTES

28 U.S.C. § 1257(a) 1, 11

42 U.S.C. § 274e(a) 15

42 U.S.C. § 1983 ..... 7, 16

California Health & Safety Code § 7054.4 ..... 15, 16

California Health & Safety Code § 7155 15

California Rule of Court 28(e) 6

California Rule of Court 29(b)(1) 6

Ohio Uniform Anatomical Gift Act 17

Respondent David W. Golde, M.D. respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the California Supreme Court in this case.

JURISDICTION

The Court lacks jurisdiction in this matter because (1) the federal question on which review is sought was not adequately raised and was not passed upon in the state courts and (2) the state court judgment sought to be reviewed is not final within the meaning of 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

In 1976 petitioner sought specialized treatment at the University of California at Los Angeles Medical Center for hairy-cell leukemia, a rare blood disorder. Pet. App. 2a. Respondent Golde, a UCLA research physician and professor of medicine, recommended that petitioner's spleen be removed, and the operation was performed in October 1976. *Id.* at 3a. The spleen was grossly enlarged, and the splenectomy improved petitioner's condition. *Id.* at 14a n. 11. Petitioner does not assert that the splenectomy was not appropriate medical therapy, nor does he claim Golde acted out of any improper motive in recommending the operation. Petitioner did not state at the time of the operation any objection to the use of the excised tissue in medical research.

Following the splenectomy, Golde and other UCLA researchers studied the leukemia cells (T-lymphocytes) from petitioner's spleen. Sometime before August 1979, Golde established a cell line from T-lymphocytes from the spleen. *Id.* at 4a.[1] Later, UCLA researchers determined that the cell line produced enhanced quantities of certain lymphokines, or proteins found in the human body which regulate the immune system. *Id.* at 4a n. 2. Eventually, it was discovered that the cell line was infected with a virus which, when applied to normal human T-lymphocytes from individuals other than petitioner, caused the cells to overproduce the same lymphokines. *Id.* at 4a n. 2, 23a n. 30.

In 1981, respondent Regents applied for a patent on the cell line, the lymphokines produced by it, and methods of purifying the lymphokines and producing them synthetically using genetic engineering techniques. *Id.* at 4a-5a; Clerk's Transcript (C.T.) 342-56. The patent issued in 1984. Pet. App. 5a. The same year, petitioner filed suit in the Superior Court of California, alleging conversion, lack of informed consent, breach of fiduciary duty, and ten other tort and contract claims under state law. *Id.* at 6a.

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[1] A cell line is an immortalized cell culture capable of reproducing indefinitely. Pet. App. 4a n. 2. As compared with primary cells (cells taken directly from the body) cell lines have enhanced growth properties and other abnormal characteristics. *Id.* at 26a n. 35. Establishing cell lines is difficult and, except for a few types of cells not involved in his case, the probability of success is low. *Id.* at 4a n. 2.

Petitioner's complaint alleged that at the time his spleen was removed, Golde and other respondents had formed the intent to study the spleen cells and to try to establish a cell line from them.[2] *Id.* at 105a-106a. Petitioner further alleged that if he had been informed of respondents' intent he would not have consented to the splenectomy, would have insisted on controlling the use of the cells to ensure that they would be "made available to other research facilities and entities expert in such matters," and "would have sought to participate in the economic and financial benefit" from the research. *Id.* at 109a. He also alleged that he "owned" not only the spleen cells, but the cell line established by Golde, the lymphokines produced by it, and the chemical sequences of the genes for the lymphokines. *Id.* at 102a, 128a. Finally, petitioner alleged that his "damages" included the cell line, its products, the "patents, licenses, profits, inventions, genetic sequences," and all other valuable results of respondents' research activities. *Id.* at 130a. Although petitioner's complaint was amended three times, at no time did the complaint assert any claim under federal law. In fact, petitioner asserted that his complaint "does not raise issues which 'arise under' the Constitution, laws or treaties of the United States." C.T. 193.

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[2] Petitioner inaccurately asserts that the complaint alleged respondents determined the spleen cells were "valuable" before the operation. Pet. 3. In fact, the complaint alleged only that respondents knew that "certain" blood components of "certain" patients could prove to be valuable. Pet. App. 104a. Petitioner specifically declined to allege that respondents knew anything of commercial value might be obtained from petitioner's spleen tissue at the time it was removed. C.T. 982-83, 1045-49.

The superior court dismissed petitioner's suit based in part on his failure to allege that respondents knew anything of commercial value might result from their research at the time the tissue was removed. C.T. 982-83. Petitioner appealed to the California Court of Appeal. Again, petitioner failed to assert any claim based on federal law. The court of appeal concluded petitioner had stated a cause of action for conversion, and declined to decide the other issues in the case. 215 Cal. App. 3d 709, 249 Cal. Rptr. 494 (1988).

Respondents petitioned the California Supreme Court to review the case. In his answer to the petitions, petitioner again failed to raise any issue of federal law. The supreme court granted review and petitioner for the first time asserted in his brief on the merits, without any significant discussion, that respondents' conduct violated the Due Process Clause of the federal Constitution. Pet. App. 97a. Petitioner did *not* assert in his brief the claim under the Just Compensation Clause which he seeks to raise in this Court.[3] The supreme court held petitioner had stated a cause of action for lack of informed consent or breach of fiduciary duty, but not conversion. The court concluded petitioner had no property interest in the excised tissue under state law, and declined to extend the

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[3] Petitioner inaccurately represents to the Court that he did assert his just compensation claim in his brief in the California Supreme Court. Pet. 11. In fact, as the excerpt of that brief printed in petitioner's appendix makes clear, petitioner argued *only* that respondents' actions constituted a deprivation of a property interest without due process, in violation of the federal *Due Process* Clause. Pet. App. 97a.

law to create such an interest. The court did not discuss petitioner's belated constitutional claim. 51 Cal. 3d 120, 793 P.2d 479, 271 Cal. Rptr. 146 (1990). Finally, in a petition for rehearing, petitioner raised for the first time the just compensation claim on which he now bases his petition for certiorari. Pet. App. 100a.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Federal Question on Which Petitioner Seeks Review Was Not Properly Raised, and Was Not Passed Upon, in the State Courts.

A fundamental jurisdictional requirement for review by this Court of a state court decision is that the federal question on which the petitioner seeks review must have been adequately presented to the state courts in the first instance. *Street v. New York*, 394 U.S. 576, 582 (1969). As the Court said in *Street*, "If the question was not so presented, then we have no power to consider it." *Id.*

Here, petitioner first asserted his "taking" claim in his petition for rehearing in the California Supreme Court. Pet. App. 100a.[4] The claim was not passed upon by that court.[5] This Court has repeatedly stated that "when

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[4] See footnote 3, *supra*.

[5] The court noted that an opposing party had suggested that the law of eminent domain might apply to the case, but found it unnecessary to decide that issue in view of its conclusion that petitioner retained no ownership interest in his diseased cells following their removal from his body. Pet. App. 36a n. 44. The court observed that the argument had not been presented to the lower courts. *Id.*

. . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York, supra,* 394 U.S. at 582; *accord, Exxon Corp. v. Eagerton,* 462 U.S. 176, 181 n. 3 (1983); *Fuller v. Oregon,* 417 U.S. 40, 50 n. 11 (1974).

To preserve a federal question for review by this Court, a party must timely raise it in the state courts in compliance with the procedural rules of those courts. *Beck v. Washington,* 369 U.S. 541, 549-52 (1962). California Rule of Court 29(b)(1) provides that, as a matter of policy, the California Supreme Court normally will not consider "any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal." The supreme court has repeatedly declined to reach issues not raised in compliance with this provision. See, *e.g., Estate of MacDonald,* 51 Cal. 3d 262, 267 n. 4, 794 P.2d 911, 272 Cal. Rptr. 153 (1990); *Henning v. Industrial Welfare Com.,* 46 Cal. 3d 1262, 1280-81 n. 1, 762 P.2d 442, 252 Cal. Rptr. 278 (1988); *Molko v. Holy Spirit Assn.,* 46 Cal. 3d 1092, 1111 n. 13, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert. denied* 109 S. Ct. 2110 (1989). Similarly, California Rule of Court 28(e) requires that all issues proposed for review by the California Supreme Court be set forth in the petition for review or the answer to it, and that "[o]nly the issues set forth in the petition and answer or fairly included in them need be considered by the court." Again, the court has declined to consider issues not raised in compliance with the rule. See, *e.g., People v. Calio,* 42 Cal. 3d 639, 643 n. 4, 724 P.2d 1162, 230 Cal. Rptr. 137 (1986).

Petitioner did not assert his "taking" argument in his brief in the California Court of Appeal, nor did he include it in his statement of issues presented for review in his answer to the petitions for review in the California Supreme Court. Under *Beck, supra,* he has waived any right to review in this Court. *See also Exxon Corp. v. Eagerton, supra,* 462 U.S. at 181 n. 3 (declining to consider federal issue raised for the first time in brief before state supreme court, where general practice of state appellate courts was not to consider issues raised for first time on appeal).

Petitioner contends, however, that he is relieved of the requirement of having raised the federal issue below by this Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985). Pet. 13 n. 14. He argues that under *Williamson County,* his federal taking claim did not "ripen" until the California Supreme Court finally ruled he had no valid claim under state law for conversion. Therefore, according to petitioner, he was not required to raise the federal question in the state courts at all, and his attempt to raise it in the California Supreme Court was actually premature. *Id.* at 13-14 n. 14.

In *Williamson County* this Court held that a federal taking claim is not ripe until the property owner has sought and been denied just compensation through the procedures the state has provided for doing so. 473 U.S. at 194-95. Since in *Williamson County* state law allowed a property owner to bring an inverse condemnation action to obtain just compensation for an alleged taking, the Court held the owner could not bring an action under 42 U.S.C. § 1983 for a taking under the federal Constitution

until it had availed itself of the state procedure. *Id.* at 196-97. However, the Court did not hold that in the course of pursuing its state inverse condemnation remedy the owner could not also assert its claim that a failure to award the relief it sought would amount to a taking without just compensation in violation of the federal Constitution. Indeed, since *Williamson County* involved review of federal court rather than state court proceedings, the Court had no occasion to consider the question of the appropriate procedure for preserving a federal taking claim in state court.

The Court did consider this question two years later in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). In that case, a property owner brought suit in the Superior Court of California for inverse condemnation, seeking damages for an alleged regulatory taking. The trial court dismissed the claim for damages on the ground that California case law did not permit an inverse condemnation action based upon a regulatory taking. Although the complaint had invoked only the California Constitution, the owner argued on appeal to the California Court of Appeal that the rule of state law denying inverse condemnation as a remedy in cases of regulatory taking violated the United States Constitution. *Id.* at 313 n. 8. The Court of Appeal rejected the argument and affirmed the dismissal. The California Supreme Court denied review.

On the owner's appeal to this Court, the Court considered (1) whether the owner's claim for compensation under the federal Constitution was ripe for review and (2) whether that claim had been properly preserved in the state courts. The Court concluded the claim was ripe

under *Williamson County, supra,* since the owner had sought and had been denied compensation from the state by filing its inverse condemnation action and having the action dismissed. 482 U.S. 312 n. 6. At the same time, the Court concluded that since the owner had concurrently raised the federal constitutional argument in the California Court of Appeal, where it was rejected, and had preserved the question on appeal to the California Supreme Court, the issue had been properly preserved for review in this Court. *Id.* at 313 n. 8.

If petitioner were correct that *Williamson County* obviates the need for raising the federal issue in the state courts, then this Court's discussion in *First English* of whether the federal issue had been properly preserved for review would be superfluous. Instead, the Court simply would have held that whether the federal claim had been raised in the state court was irrelevant.

Similarly, in *Peduto v. City of North Wildwood,* 878 F.2d 725 (3d Cir. 1989), property owners sued in state court for inverse condemnation based on an alleged temporary taking of their property without compensation. In their state court suit, the owners concurrently asserted claims under the federal Constitution and under state law. The state court, addressing the federal claims at length, dismissed the action. The owners then sued in federal court, asserting the same federal claims. The Third Circuit held the federal action was barred by the adverse state court judgment. *Id.* at 728-29. Again, if petitioner's interpretation of *Williamson County* were correct, the Third Circuit's decision in *Peduto* would be erroneous. Under petitioner's view of the law, the Third Circuit should have held that the owners' attempt to assert their "unripe"

federal claims in state court was premature and that the state court judgment rejecting those claims was therefore void for want of jurisdiction and, as such, was no bar to the litigation of the claims in federal court.

Finally, in at least two decisions predating *Williamson County*, this Court assumed that the traditional requirement that a federal claim be properly raised in state court to be reviewable by this Court applied to a taking claim under the federal Constitution. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n. 5 (1980); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 n. 5 (1980). Once again, if petitioner's interpretation of *Williamson County* were correct, the Court's discussion in these cases of whether the federal question had been presented adequately in the state courts would be superfluous.

These authorities demonstrate that, contrary to petitioner's contention, a federal taking claim, even though it is not ripe for review in federal court until the state court denies compensation under state law, not only can be but must be raised in the state court which is deciding the claim for compensation under state law. If the state court concludes that state law does not provide a right to compensation, it must then decide whether such a right is compelled by federal law. If it denies compensation, and if the denial is affirmed by the highest court of the state, the federal question properly can be reviewed by this Court. Since petitioner failed to follow the required procedure, his petition should be denied.

2. The Judgment of Which Petitioner Seeks Review is Not a Final Judgment Within the Meaning of 28 U.S.C. § 1257(a) Because It Contemplates Further State Court Proceedings Which May Render Moot Petitioner's Purported Constitutional Claim.

Under 28 U.S.C. § 1257(a), this Court may review by writ of certiorari "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." Since only final judgments may be reviewed, a judgment of the highest state court remanding the matter for further state court proceedings is generally not reviewable, at least where the outcome of the further proceedings may affect or render moot the issue of federal law which the Court is asked to review. In *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 311 (1987), for example, the Court observed that in several earlier cases it had declined to review, on the ground of lack of finality, issues arising from alleged takings of property without just compensation in violation of the federal Constitution where "factual disputes yet to be resolved by state authorities might still lead to the conclusion that no taking had occurred."

In this case, the California Supreme Court ordered that the trial court sustain, without leave to amend, the demurrers to petitioner's cause of action for conversion. However, the court's ruling did not finally dispose of petitioner's remaining claims. Pet. App. 36a-37a. Specifically, the court ordered that Golde's demurrer to the causes of action for breach of fiduciary duty and lack of informed consent be overruled (Pet. App. 36a), meaning that on at least those claims petitioner may attempt to

establish his case on the merits. The finder of fact in the state court thus will be required to determine whether Golde in fact failed to obtain petitioner's informed consent to the removal of his diseased spleen.

Where the government's use of property is done with the owner's consent, there is no taking under the fifth amendment. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), this Court held that an applicant for registration of a pesticide could not claim a "taking" of data voluntarily submitted by it to the Environmental Protection Agency. The Court stated, "[A]s long as Monsanto is aware of the conditions under which the data are submitted, . . . a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking." *Id.* at 1007; *see also Albers v. County of Los Angeles*, 62 Cal. 2d 250, 265-66, 398 P.2d 129, 42 Cal. Rptr. 89 (1965) (owner who consents to construction of public improvement on his property cannot recover under taking clause of state constitution for damage reasonably incident to the construction).

Similarly, the constitutional right to compensation for the taking of property can be lost if a claim of ownership is not asserted in an appropriate manner. In at least two decisions, this Court has upheld, against fifth and fourteenth amendment "taking" challenges, statutes providing that a mineral interest shall lapse unless the owner files a claim with the government within a specified time period. *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982); *United States v. Locke*, 471 U.S. 84, 107 (1985). As the Court said in *Texaco*, "[J]ust as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable

conditions that indicate a present intention to retain the interest." 454 U.S. at 526; *see also Dunscombe v. Loftin*, 154 F.2d 963, 967 (5th Cir. 1946) ("Even though the owner of property taken for public use has the right to receive just compensation for such property, the owner may waive that constitutional right . . . ").

Here, the trier of fact may ultimately determine that petitioner knew of and consented to UCLA's use of his excised spleen tissue. It may also determine that, even if he did not consent, petitioner knew of the intended use and waived his claim of ownership by failing to assert it in an appropriate fashion. Since either finding would be fatal to petitioner's fifth amendment claim, there may ultimately be no federal issue presented in this case and petitioner's request for review should be denied.

3. Petitioner Has No Valid Taking Claim Under the United States Constitution.

This Court has recognized repeatedly that, for purposes of the Just Compensation Clause, "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . . " *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 499 U.S. 155, 161 (1980); *Texaco, Inc. v. Short*, 454 U.S. 516, 525 (1982). Accordingly, where a party asserts a property interest claimed to be protected by the Constitution, "the sufficiency of the claim of entitlement must be decided by reference to state law." *Bishop v. Wood*, 426 U.S. 341, 344 (1976) (footnote omitted) (Due Process Clause). And where a state court concludes no property interest exists under state law, "it is the province

of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis." *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944). If it does, "this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court." (*Id.*)

In this case, the California Supreme Court concluded, under state law, that petitioner had no property interest in his excised spleen tissue sufficient to support a tort claim for conversion. Pet. App. 36a. Petitioner cannot show that the California court's decision lacked a "fair or substantial basis" (*Demorest, supra*). To the contrary, the reasons articulated by the California court for concluding petitioner had no property interest for purposes of conversion also compel the conclusion that he has no such interest for purposes of the Just Compensation Clause.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives . . . .

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); *accord, Webb's Fabulous Pharmacies, supra*, 449 U.S. at 161. Accordingly, to support a taking claim, a claimant must show a government interference with interests that are "sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978).

The California Supreme Court correctly recognized that petitioner "clearly did not expect to retain possession of his cells following their removal." Pet. App. 19a. Therefore, petitioner could only establish a property right if he could show he retained an ownership interest in the cells after their removal. *Id.*[6] The court concluded that petitioner lacked any continuing ownership interest under state law. Among other authorities, the court referred to California Health and Safety Code section 7054.4, which provides that

> [n]otwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any

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[6] Petitioner asserts, inaccurately, that the court "agreed that petitioner possessed a property interest in his bodily substances prior to their extraction." Pet. 14. In fact, the court recognized that the law deals with human biological materials as objects *sui generis, not* as property. Pet. App. 20a. It is one thing to acknowledge that individuals have a de facto right of possession and control over materials which are part of their bodies. It is another thing entirely to assert that this right means the materials are "property" on which a fifth amendment claim can be predicated. To the contrary, bodily materials lack the attributes ordinarily associated with property. Statutes governing organ donation typically prohibit the sale of body parts. See, e.g., 42 U.S.C. § 274e(a); Cal. Health & Saf. Code § 7155. Most bodily materials have no intrinsic monetary value, while, as petitioner himself acknowledges, property is that "upon which it is practicable to place a money value." Pet. 19, quoting *Yuba River Power Co. v. Nevada Irr. Dist.*, 207 Cal. 521, 523, 279 P. 128 (1929). And no one would seriously assert that petitioner's creditors could execute on his body as his "property" to satisfy a judgment against him. *See First Victoria Nat. Bank v. United States*, 620 F.2d 1096, 1103 (5th Cir. 1980).

> other method determined by the state department [of health services] to protect the public health and safety.

Pet. App. 24a. The court concluded that "one cannot escape the conclusion that the statute's practical effect is to limit, drastically, a patient's control over excised cells" and that "the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to 'property' or 'ownership' for purposes of conversion law." *Id.* at 25a.[7]

It is instructive to contrast this case with the recent decision of the Sixth Circuit in *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. January 18, 1991). The majority in that case held that a decedent's widow who had expressly declined to authorize an anatomical gift of his body parts could sue under 42 U.S.C. § 1983 for the county coroner's removal of the decedent's corneas for anatomical gifts. The court looked to Ohio law to determine whether the

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[7] Petitioner argues that the issue here is "whether petitioner is entitled to compensation for the taking of his bodily materials *for* scientific and commercial use, not whether petitioner retains an unrestricted right to dominion and control *after* the State has finished exploiting the commercial potential of the material." Pet. 15 (emphasis in original). The answer, of course, is that under the decisions of this Court discussed above, it cannot be determined whether compensation is required for a taking until it is determined that "the challenged government action . . . interfere[d] with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Penn Central Transp. v. City of New York, supra*, 438 U.S. at 124-25. As the California Supreme Court correctly recognized, section 7054.4 negates any such "reasonable expectations."

widow's interest in the decedent's corneas rose to a "legitimate claim of entitlement" protected by the Due Process Clause.[8] The court concluded that since state law recognized the right of a surviving spouse to possession of the decedent's body for purposes of preparation, mourning, and burial, "Ohio does grant that right which resides at the very core of a property interest: the right to possess." That right, in combination with the right granted to the widow under the Ohio Uniform Anatomical Gift Act to control the disposal of the decedent's body, rose to the level of a legitimate claim of entitlement protected by the Due Process Clause and required predeprivation process.[9]

In this case, in contrast, the highest court of the state has determined that petitioner had no legitimate expectation under state law of a right of possession of his cells following their removal. Pet. App. 19a. Not only does state law not grant such a right, the court recognized it would be inconsistent with section 7054.4. Pet. App. 19a n. 20.

For these reasons, the California Supreme Court correctly concluded that petitioner had no reasonable expectation of continued ownership of his cells after their removal. The court further held that petitioner had no legitimate interest in the immortalized cell line derived

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[8] No taking claim was asserted in *Brotherton*.

[9] One judge dissented, concluding that the limited rights granted under Ohio law did not amount to a property interest under the Constitution.

from the excised cells, or the biological products of the cell line. The court recognized that, despite petitioner's conclusory allegation that he "owned" those materials, as well as the genetic sequences contained in them, the patented cell line was legally and factually distinct from the cells taken from petitioner's body.[10] The court held that, since naturally occurring raw materials cannot be patented, the patented cell line was by definition distinct from the tissue from which it was derived. Pet. App. 27a. Moreover, the court observed that federal patent law precludes petitioner's claim of ownership of the subjects of the patent, since petitioner does not meet the statutory criteria for inventorship. *Id.* at 27a-28a n. 37.

For the same reasons, petitioner has no valid claim under the Constitution for the value of the cell line and its products as compensation for the alleged "taking" of his spleen tissue. In giving content to the Just Compensation Clause, "this Court has sought to put the owner of condemned property 'in as good a position pecuniarily as

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[10] Petitioner argues, without the citation of any authority, that the California court's reference to judicially noticed scientific material in reaching this conclusion was done "in violation of California law and basic notions of fairness." Pet. 10 n. 10. As this Court has recognized, however, California law expressly permits a court in ruling on a demurrer to make reference to judicially noticed facts. *Agins v. City of Tiburon*, 447 U.S. 255, 259 n. 6 (1980). Golde requested in his opening brief that the court judicially notice the referenced material. Although petitioner claims he "was never afforded an opportunity to submit to the court his own views on the persuasiveness of the materials on which the court relied" (Pet. 10 n. 10), he has identified no reason why he could not have done so in his own brief.

if his property had not been taken.' " *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979). Here, had petitioner's spleen not been removed and studied by respondents, there would have been no cell line and thus no value for petitioner to attempt to claim. "Since the owner is to receive no more than indemnity for his loss, *his award cannot be enhanced by any gain to the taker.*" *United States v. Miller*, 317 U.S. 369, 375 (1943) (emphasis added; footnote omitted). "[I]t is the owner's loss, not the taker's gain, which is the measure of compensation. . . . [T]he sovereign must pay only for what it takes, not for opportunities which the owner may lose." *United States v. Powelson*, 319 U.S. 266, 281-82 (1943). "That the 'taker' may reap a profit above and beyond the value of the property interest taken does not entitle the person from whom the property is taken to share in those profits." *Carroll v. State Bar*, 166 Cal. App. 3d 1193, 1204, 213 Cal. Rptr. 305, *cert. denied* 474 U.S. 848 (1985).[11]

The Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980); *accord, Penn Central Transp. Co. v. City of New York*, 438 U.S. 104,

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[11] Indeed, petitioner's formulation of his alleged "expectation" that he could "reap a reasonable return" for the commercial use of the spleen tissue (Pet. 19) begs the question by ignoring the fact that, at the time the tissue was removed, there was no reason to suspect any monetary return could be derived from it. Thus, petitioner could not "reasonably" have expected any monetary compensation when he decided to undergo the operation.

123 (1978). The determination of when "justice and fairness" require that compensation be paid "depends largely 'upon the particular circumstances' " of the case. *Penn Central, supra,* at 124. In particular, the Court has upheld government conduct "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted" by the challenged action. *Id.* at 125.

In this case, the California Supreme Court recognized that "[r]esearch on human cells plays a critical role in medical research." Pet. App. 31a. The court concluded that recognizing a right to sue for conversion would obstruct research by making each cell sample "the potential subject matter of a lawsuit." *Id.* at 31a-32a. The same would be true if petitioner's attempted federal taking claim were recognized. Any patient whose excised tissue was the subject of research by any governmental entity could assert a similar claim.[12]

In the context of patent law, this Court has recognized repeatedly that "encouragement of individual

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[12] Since the Just Compensation Clause only requires compensation for public takings, recognition of a taking claim in this context would lead to the anomalous result that government entities would be liable for using tissue even though private organizations using the same tissue would not. For this reason, petitioner's suggestion that this Court should grant review to insure uniformity among the laws of the various states (Pet. 21) is misplaced; with respect to private entities, state tort law will continue to govern in any event. As discussed later, a more sensible solution would be legislative resolution of the issues involved, perhaps in the manner of the Uniform Anatomical Gift Act.

effort by personal gain is the best way to advance public welfare . . . . " *Mazer v. Stein*, 347 U.S. 201, 219 (1954). "The productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy . . . . " *Diamond v. Chakrabarty*, 447 U.S. 303, 307 (1980). Accordingly, patent law offers "an incentive to inventors to risk the often enormous costs in terms of time, research and development." *Kewanee Oil Company v. Bicron Corporation*, 416 U.S. 470, 480 (1974). Recognition of petitioner's taking claim would interfere with this incentive by making governmental inventors such as Golde and Quan pay damages to parties, such as petitioner, who have made no such investment of time or effort.[13]

Finally, as this Court has observed, important policy decisions require "the kind of investigation, examination, and study that legislative bodies can provide and courts cannot." *Diamond v. Chakrabarty, supra*, 447 U.S. at 317. The policy questions raised by petitioner's taking claim are ill-suited to judicial resolution. In the absence of legislative guidance, the Court should not recognize liability which creates more problems than it solves.

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[13] For this reason, petitioner's attempted analogy to cases recognizing a "right of publicity" (Pet. 19) fails. As this Court has observed, the policy underlying the right of publicity is to provide "an economic incentive . . . to make the investment required to produce a performance of interest to the public." *Zacchini v. Scripps – Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977). The right protects "the product of [a person's] own talents and energy, the end result of much time, effort, and expense." *Id.* at 575. It was respondents' effort, not petitioner's, which created the value petitioner now seeks to recover.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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